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## ABSTRACT

Campus collective bargaining proceedings associated with the National Labor Relations Board (NLRB) versus Yeshiva University case are analyzed. The number of institutions exercising Yeshiva-like claims has risen to 49, and the vast majority of the claimants are institutions that have challenged the right of the faculty to organize and bargain collectively under the National Labor Relations Act. Since a number of these colleges already have faculty unions, demands for unit clarification have been the main vehicle in exercising Yeshiva claims. A profile of these institutions describes the typical claimant as a small four-year, private college with either the American Association of University Professors or the American Federation of Teachers as the bargaining agent. A roster of institutions affected by the Yeshiva Decision is presented that provides information on the unit size, current or pending bargaining agent, and the year the agent was elected. Information is also presented on the number and disposition of Yeshiva claims filed so far. Nineteen of the organized institutions at the time of Yeshiva have never signed a collective agreement. It is concluded that unions are still free to organize and bargain collectively; however, they can no longer do so under the protection of the NLRB nor can they use the Board as an organizing weapon. Boston University and the Polytechnic Institute of New York cases will be dispositions in terms of adjudicating future claims. If Yeshiva is extended to these two institutions, the legal battle has been lost and the unions will have to shift to the legislative arena. Yeshiva has brought campus labor relations closer to the industrial model. (SW)

NEWSLETTER

National Center  
For the Study of  
Collective Bargaining  
in Higher Education  
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# NEWSLETTER

NATIONAL CENTER  
FOR THE STUDY OF  
COLLECTIVE BARGAINING  
IN HIGHER EDUCATION  
AND THE PROFESSIONS

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## DISTINGUISHING YESHIVA: A TROUBLING TASK FOR THE NLRB

### INTRODUCTION:

In the two and half years that have passed since the United States Supreme Court declared the faculty at Yeshiva University to be managerial employees and, therefore, not entitled to bargain collectively under the protection of the National Labor Relations Act, a virtual drought has occurred with respect to unionization in the nation's private colleges and universities (444 U.S. 672 1980). In upholding the unanimous findings of the 2nd Circuit Court of Appeals, the Supreme Court's decision gave rise to a plethora of *Yeshiva*-like claims. Of the 110 private colleges and universities engaged in faculty labor relations, nearly 50 have taken exception to Footnote 31 which was designed, in part, to limit the applicability of *Yeshiva* and have exercised some type of *Yeshiva*-like claim.

*Yeshiva* marked the first reversal that the National Labor Relations Board experienced with respect to faculty unionism in more than a decade. Since the decision by the USSC in February of 1980, litigation on this issue has been exhaustive while at the same time, there had been a noticeable absence of any response by the Board. It was not until April, 1982 that any decisions were issued by the Board, that alone attesting to the difficulty that the members have had reconciling this decision with the history of academic collective bargaining.

The post-*Yeshiva* period has been one of uncertainty and legal complexities. The national faculty unions have filed numerous unfair labor practices under the National Labor Relations Act as part of their strategy designed to force management to the bargaining table while at the same time they have been compelled to defend themselves against employer petitions for unit clarification hearings. As of this date, the institutional *Yeshiva* claims, as well as the now predicted *Yeshiva* defenses, show no sign of lessening.

### POST-YESHIVA

The purpose of this article is to analyze campus collective bargaining proceedings associated with *Yeshiva* and to update previous NCSCBHEP studies on this topic. The direction that academic collective bargaining in the private sector might take in the future as well as implications for professional employees other than professors are also examined.

### YESHIVAWATCH

The number of institutions exercising *Yeshiva*-like claims has now risen to 49. Of these, 14 have filed claims in the past year and may be considered as second generation. The vast majority of the claimants are institutions who have challenged the right of the faculty to organize and bargain collectively under the National Labor Relations Act. Since a number of these colleges already have faculty unions, demands for unit clarification have been the main vehicle in exercising *Yeshiva*. In those institutions where no organization has been certified, the management response has either been an outright refusal to recognize or partake in negotiations with the faculty union or to completely challenge the union's existence as a

bargaining agent under *Yeshiva*. In all cases, *Yeshiva* has been cited as controlling, with all parties attempting to distinguish the facts in the instant case.

A profile of these institutions describes the typical claimant as a small four-year, private college with either the AAUP or AFT as the bargaining agent. Both agents represent approximately 16 faculty bargaining units each at these institutions. Unit size averages approximately 110 with a range of 22 to 860. Twelve institutions have some religious affiliation which has caused additional legal complexities. (See *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), and *Barber-Scotia College*, 245 NLRB 406 (1979)). Table One identifies those colleges and universities where claims have been filed.

Of the 88 unionized colleges involved in collective bargaining in higher education at the time of the *Yeshiva* decision (February 1980), 28 have filed claims. Subsequent to *Yeshiva*, an additional 21 institutions, including two public universities that had not previously elected or had Board certified agents at the time of the decision, have filed claims. Thus, over 40% of all private colleges and universities engaged in academic collective bargaining have now filed *Yeshiva* claims. This type of legal action is virtually unparalleled as no other case impacting on collective bargaining in higher education, except perhaps, the original NLRB ruling in *Cornell University*, 183 NLRB 329 (1970) where the Board first accepted jurisdiction, has generated this type of response. It is clear that *Yeshiva* has not been interpreted in the narrow sense and indeed, the opposite has occurred.

In 1981, only two new private institutions were organized while the number of initial contracts signed severely diminished. (See NCSCBHEP Directory, Volume 8, January 1982). While the diminution of union activity in the private sector is multi-dimensional, the chilling effect of *Yeshiva* can be considered as a prime cause. It is difficult to assess *Yeshiva*'s impact on the public sector since the vast majority of the time spent organizing by the national unions has been devoted to the representational struggle at California State University. The enabling legislation protecting the bargaining rights of the CSU faculty precludes any such claims from being raised.

Table Two summarizes *Yeshiva* claims filed thus far. Nineteen of the organized institutions at the time of *Yeshiva* have never signed a collective agreement. Included in this groups are five law schools where the prospects of collective agreement of collecting agreements being negotiated are minimal.

Disposition of *Yeshiva* claims have occurred in half of the institutions identified in Table One with cases having been settled, upheld, or rejected. Eight of these may be construed as having been resolved through negotiations by the parties. In *Curry*, *Ashland*, *Duemen* and *Simon's Rock*, the AAUP voluntarily withdrew its union certification status in exchange for new "agreements." These "agreements" are not considered traditional labor agreements but do incorporate many of the terms and conditions of employment previously contained in either collective agreements and/or faculty handbooks. At *Simon's Rock*, the agreement was reached with the faculty association as the AAUP withdrew its petition for union certification as a *quid pro quo* for a settlement.

At *Colley*, a two-year successor agreement was negotiated with the administration submitting that no *Yeshiva* claim was ever filed. *Drury* reached a settlement which incorporated a "philosophy of governance"

TABLE ONE  
ROSTER OF INSTITUTIONS AFFECTED BY THE YESHIVA DECISION

| Institution                               | State | Unit Size | Current or Pending Bargaining Agent | Year Current Agent Elected |
|-------------------------------------------|-------|-----------|-------------------------------------|----------------------------|
| Adrian College                            | MI    | 56        | NEA                                 | '75                        |
| American International College            | MA    | -         | AAUP                                | -                          |
| American Univ. English Lang. Institute    | DC    | 37        | ELIFA                               | '82                        |
| Ashland College                           | OH    | 82        | AAUP                                | '72                        |
| Boston University                         | MA    | 860       | AAUP                                | '75                        |
| Bradford College                          | MA    | 29        | IBT                                 | '82*                       |
| Catholic Univ. of America Law School      | DC    | 22        | IND                                 | '77*                       |
| College of Osteopathic Medicine           | IA    | 65        | AFT                                 | '75                        |
| Cooper Union                              | NY    | 55        | AFT                                 | '76                        |
| Cotley College                            | MO    | 32        | AFT                                 | '76                        |
| Curry College                             | MA    | 95        | AAUP                                | '79                        |
| Dacemen College                           | NY    | 80        | AAUP                                | '79                        |
| Drury College                             | MO    | 60        | AAUP                                | '79                        |
| Duquesne University Law School            | PA    | 26        | Faculty Assn.                       | Y                          |
| Florida Memorial College                  | FL    | 40        | UFF/AFT                             | '79                        |
| Ithaca College                            | NY    | -         | NYSUT/AFT                           | '78*                       |
| Lewis University                          | IL    | 97        | IND                                 | '75                        |
| Livingstone College                       | NC    | 77        | AFT                                 | -                          |
| Long Island Univ.-Brooklyn                | NY    | 250       | AFT                                 | '76                        |
| Long Island Univ.-C.W. Post               | NY    | 350       | AFT                                 | '76                        |
| Long Island Univ.-College of Pharmacy     | NY    | 25        | AAUP                                | '78                        |
| Long Island Univ.-Southampton             | NY    | 72        | AFT                                 | '76                        |
| Loretto Heights College                   | CO    | 100       | NEA                                 | '72                        |
| Milton College                            | WI    | 35        | AFT                                 | '79                        |
| Montefiore Hospital/Medical Center        | NY    | -         | NYS FED.PHY-DENTISTS                | -                          |
| Mount Vernon College                      | DC    | 25        | AAUP                                | '77                        |
| Nasson College                            | ME    | 30        | AFT                                 | '77                        |
| Ohio Northern University                  | OH    | 145       | NEA                                 | '79                        |
| Polytechnic Institute of New York         | NY    | 220       | AAUP                                | '71                        |
| Pratt Institute of New York               | NY    | -         | -                                   | -                          |
| Rio Grande                                | OH    | 53        | IND                                 | '76                        |
| Saint Joseph College                      | ME    | 27        | NEA                                 | -                          |
| Saint Theresa College                     | MN    | -         | AAUP                                | -                          |
| Salem College                             | WV    | 64        | NEA                                 | '79                        |
| Seattle University                        | WA    | -         | AUP                                 | -                          |
| Seton Hall University                     | NJ    | -         | AFT                                 | -                          |
| Simon's Rock Early College                | MA    | 27        | SRFBC/AAUP                          | '80                        |
| Stephens College                          | MO    | 120       | AFT                                 | '79                        |
| Stephens Institute/Academy of Art College | CA    | -         | IND                                 | -                          |
| Stevens Institute of Technology           | NJ    | 109       | AAUP                                | '76                        |
| Thiel College                             | PA    | 63        | AAUP                                | Y                          |
| University of Alaska                      | AL    | -         | NEA                                 | '82*                       |
| University of Albuquerque                 | AL    | -         | NEA                                 | '82*                       |
| University of New Haven                   | CT    | 130       | AFT                                 | '79*                       |
| Villanova University                      | PA    | -         | AAUP                                | -                          |
| Wagner College                            | NY    | 105       | AFT                                 | '79*                       |
| Wichita College                           | KS    | -         | KEA                                 | -                          |
| Wichita State University                  | KS    | -         | KEA                                 | -                          |
| Wilberforce University                    | OH    | 49        | AAUP                                | '79                        |
| Yeshiva University                        | NY    | 200       | IND                                 | '76*                       |

\*Agent defeated - No agent elected

\*Yeshiva claim upheld

Source: NCSCBHEP Research

and also implemented a "meet and confer" policy. This action resulted in both parties dropping all *Yeshiva*-related court actions. C.W. Post and Southampton signed multi-year agreements in which the colleges voluntarily recognized the unions as representatives of managerial employees while the unions acknowledged no NLRB jurisdiction over the faculty. At *Milton*, the college went out of business and although this cannot be attributed to *Yeshiva*, it does lend a sense of finality to the institution's allegations.

Eight *Yeshiva* claims have been rejected by either the NLRB, the courts or state labor relations agencies. In *Alaska*, the state labor relations agency denied the university's contentions and ordered unit determination hearings. A subsequent election was held in which the faculty voted "No Agent." In *Wichita*, the State PERB refused to extend *Yeshiva* to the public sector and designated an appropriate bargaining unit, however, no bargaining agent election is foreseen in the near future. In *Pratt*, the NLRB

TABLE TWO  
SUMMARY OF INSTITUTIONS FILING YESHIVA CLAIMS

|                                                                                                                                                                 |        |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| a) Number of faculty units at private institutions at time of <i>Yeshiva</i> decision.                                                                          | 90     |
| b) Number of private institutions at time of <i>Yeshiva</i> decision with certified faculty units who have not yet negotiated collective bargaining agreements. | 19     |
| c) Number of private institutions engaged in academic collective bargaining at time of <i>Yeshiva</i> decision filing <i>Yeshiva</i> claims.                    | 28     |
| d) Number of new collective bargaining agreements signed in private institutions subsequent to <i>Yeshiva</i> .                                                 | 6      |
| e) Number of new collective bargaining agreements signed in private institutions subsequent to <i>Yeshiva</i> where <i>Yeshiva</i> claims have been raised.     | 3      |
| f) Number of <i>Yeshiva</i> claims filed by private institutions not organized at time of <i>Yeshiva</i> decision.                                              | 16     |
| g) Number of private institutions with faculty unions closed subsequent to <i>Yeshiva</i> .*                                                                    | 3      |
| h) Number of public institutions filing <i>Yeshiva</i> claims.**                                                                                                | 2      |
| i) Total number of <i>Yeshiva</i> claims filed out of private sector collective bargaining universe.                                                            | 47/110 |

\*Detroit Institute of Technology, Goddard Graduate Faculty, Milton College.

\*\*University of Alaska, Wichita State University

Source: NCSBHEP Research

held that *Yeshiva* was not applicable to non-faculty administrative employees (256 NLRB No. 175 (1981)), and that the Institute had engaged in an unfair labor practice. In *English Language Institute of American University*, the Regional Director of the NLRB in Baltimore denied the administration's claim and refused to declare the employees as managerial. An independent faculty association has been elected and certified as the bargaining agent. An NLRB administrative law judge ruled in *Loretto Heights*, that the faculty were non-managerial and issued a bargaining order. In *Montefiore*, the Board ruled that staff doctors were non-managerial and entitled to the protection of the Act (261 NLRB No. 82 (1982)). This case is considered significant in terms of its broader application to the health care industry. In the only junior college case identified thus far, the Board emphatically denied the managerial claims raised by *Bradford College* and ordered a bargaining agent election. The faculty subsequently voted "No-Agent." In *Stephens*, the 9th Circuit Court of Appeals held the faculty to be non-managerial and that *Yeshiva* was not dispositive as relates to this proprietary art school. (See *Stephens Institute v. NLRB* 620 F.2d 720 (9th Cir.), Cert. denied, 449 U.S. 953 (1980).)

*Yeshiva* claims have been upheld at *New Haven*, *Albuquerque*, *Ohio Northern*, *Catholic University*, *Duquesne University*, *Ithaca*, *Thiel*, and *Wagner*. Perhaps the most significant of this group was *Ithaca* (261 NLRB No. 83 (1982)) where the Board found the faculty to be managerial as delineated in *Yeshiva*. *Ithaca* was considered by many to be determinative since it included the first secular traditional private college decided by the Board since *Yeshiva*. In *Thiel* and *Duquesne*, the Board, once again, found the managerial classifications applicable holding that the faculty at these institutions were not entitled to bargain collectively under the protection of the Act. The issue of catholicity was raised and rejected by the Board as it accepted jurisdiction. In *Albuquerque*, the regional NLRB director declared the majority of the unit to be managerial. The full Board subsequently ordered the union decertified on the grounds that the bargaining unit had been decimated (NLRB 29-UC-106). At *New Haven*, the first institution to have exercised a *Yeshiva* claim, the regional NLRB director upheld the university's claim by ruling that "each faculty member is a managerial employee and thus, possesses no organizational rights protected under the Act."

In an unusual action, the regional NLRB director in Cleveland, with concurrence from the Office of Appeals of the NLRB, reversed his previous position and withdrew the complaint issued against Ohio Northern University. In this instant case, the faculty union had requested that a refusal to bargain complaint be issued. The *Yeshiva* guidelines suggest that the mechanism to resolve these issues is a formal hearing, however, the regional director, based on his own readings of *Yeshiva* and *Ithaca et. al.*, requested the Office of Appeals to withdraw its order issuing the complaint and subsequent scheduled hearing. The significance of *Ohio Northern* can be explained in the acquiescence of the Office of Appeals no longer willing to mandate the issuance of complaints since *Ithaca*. It is important to note that appeals cannot be taken past the Office of Appeals. Thus, it appears that broader discretionary power is being vested with the regional directors. Finally, in *Catholic University Law School*, the United States Circuit Court of Appeals in Washington, D. C., ruled that the faculty are managerial and cannot bargain under the protection of the NLRA.

"Yeshivawatchers" will note that the quantitative record thus far is mixed, while the qualitative record clearly comes down in favor of management. The unions have not won a single case that may be considered controlling in any manner. *Bradford*, *Montefiore*, *Pratt*, *Stephens* and *American*, all union victories, had mitigating circumstances. *Bradford* included a two-year college, *Montefiore*, a medical center, *Pratt*, a non-faculty bargaining unit, *Stephens*, a proprietary art school and *American*, a faculty at a special institute. (See Table Three for complete listing of dispositions.)

## RESPONSE OF THE BOARD

The response of the Board to *Yeshiva* was delayed for over two years. Several reasons accounted for this including presidential politics, recess appointments and routine caseload backlog. However, the Board was also faced with preparing an appropriate reply that would withstand judicial scrutiny in light of the criticism that the USSC directed at it in *Yeshiva*. Justice Powell, writing for the majority stated:

... the Board contends that the deference due its expertise in these matters requires us to reverse the decision of the Court of Appeals. The question we decide today is a mixed one of fact and law. But the Board's opinion may be searched in vain for relevant findings of fact. The absence of factual analysis apparently reflects the Board's view that the managerial status of particular faculties may be decided on the basis of conclusory rationales rather than examination of the facts of each case. The Court of Appeals took a different view, and determined that the faculty of *Yeshiva University* "in effect, substantially and pervasively operat[ed] the enterprise." 582 F. 2d, at 698. We find no reason to reject this conclusion. As our decisions consistently show, we accord great respect to the expertise of the Board when its conclusions are rationally based on articulated facts and consistent with the Act. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978). In this case, we hold that the Board's decision satisfies neither criterion.

Thus the Board had to insure that its response would meet the criteria set forth by Justice Powell and that in future cases, the decisions of the Board would not be reversed for a lack of "factual analysis" and "conclusions ... rationally based on articulated facts consistent with the Act."

In April of 1982, the Board issued five *Yeshiva* cases which collectively can be viewed as setting the direction which the entire *Yeshiva* backlog can now be expected to follow. It is clear that general rule-making was rejected as an approach and that each claim will be adjudicated on a case-by-case basis. The Board appears to be looking at the character and depth of the faculty's involvement in decision-making and not the routine and ministerial duties that faculty often are involved with.

The so-called "Ninety Percent rule," which establishes a quantifiable standard to measure faculty participation in governance, appears to have

TABLE THREE  
DISPOSITION OF YESHIVA CLAIMS

| <i>Institution</i>                             | <i>Disposition</i>                                                                                                                                                                                                                                                                                                             |
|------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| American University English Language Institute | Regional Director NLRB Baltimore ruled that faculty are not managerial employees thereby rejecting university claim. Faculty Association elected as bargaining agent 28-1.5-RC-11743 (1982.) NLRB certification issued.                                                                                                        |
| Ashland College                                | AAUP withdrew union status—college dropped <i>Yeshiva</i> claim. AAUP 1940 Statement incorporated into new Ashland Agreement. Faculty received voting rights on all communities established by Board of Trustees. AAUP Chapter retained dues checkoff.                                                                         |
| Bradford College                               | NLRB ruling, 261 NLRB No. 81 (1982) held that faculty are entitled to bargain collectively—bargaining agent election held May of 1982. International Brotherhood of Teamsters defeated 15-10 by No-Agent.                                                                                                                      |
| Catholic University Law School                 | Ruling by U. S. Circuit Court of Appeals for Washington, D. C. that faculty cannot bargain under protection of NLRA. (1980)                                                                                                                                                                                                    |
| Cotter College                                 | Two-year Successor Agreement negotiated—Expiration date 8/31/83.                                                                                                                                                                                                                                                               |
| Curry College                                  | AAUP dropped status as Board certified union—institution dropped all <i>Yeshiva</i> litigation. Negotiated new agreement.                                                                                                                                                                                                      |
| C.W. Post Center of Long Island University     | University voluntarily recognized union as representative of managerial employees. Union acknowledged no NLRB jurisdiction over faculty. Parties negotiated five-year contract through 1985.                                                                                                                                   |
| Daemen College                                 | AAUP withdrew union status—college dropped <i>Yeshiva</i> claim. Faculty Senate submitted faculty nominees, one of whom chose as voting member of Board of Trustees. Faculty handbook continued in force.                                                                                                                      |
| Drury College                                  | Settlement reached by parties—"philosophy of governance," meet and confer policy implemented—all court action dropped.                                                                                                                                                                                                         |
| Loretto Heights                                | NLRB Administrative Law Judge ruling, JD-Sf-159-81, 27-CA-6667, held that faculty were not managerial and that college committed an unfair labor practice by refusing to bargain. Bargaining order issued.                                                                                                                     |
| Milton College                                 | College closed May 1982                                                                                                                                                                                                                                                                                                        |
| Montefiore Hospital and Medical Center         | NLRB ruling, 261 NLRB No. 82 (1982), held that staff doctors entitled to bargain collectively under the protection of the Act. Board rejected managerial participation and alignment claims.                                                                                                                                   |
| Ohio Northern                                  | Regional Director, with acquiescence from Office of Appeals, reversed previous position and withdrew complaint against the university. Decision based on NLRB rulings in <i>Ithaca et. al.</i>                                                                                                                                 |
| Pratt Institute Non-Faculty Administrators     | NLRB ruling, 256 NLRB No. 175 (1981), held that <i>Yeshiva</i> was not applicable to non-faculty administrative employees. Held that Pratt had engaged in unfair labor practices. Cease and desist order issued.                                                                                                               |
| Simon's Rock Early College                     | Labor agreement reached with non-Board certified union. Petition for union certification withdrawn by AAUP in exchange for settlement.                                                                                                                                                                                         |
| Southampton College of Long Island University  | University voluntarily recognized union as representative of managerial employees. Union acknowledged no NLRB jurisdiction over faculty. Parties negotiated four-year contract through 1984.                                                                                                                                   |
| Stephens Institute/Academy of Art              | Circuit Court rejected employer's claim that faculty are managerial. <i>Yeshiva</i> not controlling. (620 F.2d 720, (9th Cir.)).                                                                                                                                                                                               |
| Thiel College                                  | NLRB ruling, 261 NLRB No. 84 (1982), held that faculty were not entitled to bargain collectively under NLRA. Entire faculty deemed managerial consistent with <i>Yeshiva</i> .                                                                                                                                                 |
| University of New Haven                        | Regional NLRB 39-CA-23, 39-CA-181, 39-CA-183, (1982) ruling held that "each faculty member is a managerial employee and thus, possesses no organizational rights protected under the Act." Also held that University of New Haven Board of Faculty Welfare, Local 1956 C.S.F.T.-A.F.T. not a labor organization under the Act. |
| Wagner College                                 | Regional NLRB Director granted employer's petition for unit clarification and excluded all full-time faculty members, including department chairmen, from unit. 29-UC-147. AAUP original union certification under the act.                                                                                                    |
| Wichita State University                       | Kansas State PERB rejected university's <i>Yeshiva</i> claim—established appropriate bargaining unit—no election scheduled.                                                                                                                                                                                                    |

been rejected although percentages of administrative concurrence with faculty decisions are referred to in these latest decisions. The Board will stay with the decisions of the courts and is expected to be extremely careful lest it be accused of straying. An attempt will probably be made to develop a definitive body of case law which the parties can rely on to alleviate the necessity of litigating future *Yeshiva* issues.

The question, "In whose interests does the faculty act?" no longer appears to be a viable issue. The previous argument which held that "all who act in the interest of the employer," must be considered as management while those "acting in their own interest" are clearly non-managerial is not valid in an academic setting. The key test for resolving the managerial status of faculty will depend on the appearance of authority and how valid that perception is.

Set forth below is an analysis of the five cases decided on April 30, 1982, as well as commentary on other pertinent decisions.

1. *Ithaca College and Ithaca College Faculty Association*, NYSUT/AFT, 261 NLRB No. 83 (1982).

In *Ithaca*, the Board ruled that the entire faculty were managerial employees and not protected under the Act. The crucial issues appear to have revolved around the role that faculty committees played in establishing policy which affected their own operations. The Board stated:

... The decision whether to operate through subcommittees or some other formal structure is left to the faculty of each school. In each of the schools and the one division, the faculty determines the curriculum. It decides what courses will be offered, and the credit hours, class size, and prerequisites for each. The faculty has the authority to modify or add to the curriculum. In some schools, faculty recommendations regarding curricular changes require the approval of the dean; such approval, however, is routinely forthcoming. In the School of Humanities and Sciences, for example, the dean has approved every one of an estimated 500 such recommendations made to him by the faculty. The faculties schedule courses and determine teaching assignments. The faculties also set academic policies, and individual schools are empowered to adopt provisions which are more restrictive than those applicable college-wide. In this regard, policies relating to academic standing, graduation requirements, grading, attendance, course distribution requirements, and examinations are effectively determined by the faculties, and policies in these areas cannot be implemented without faculty approval. The various faculties also control the admission of students into their respective schools. They are free to establish admissions standards higher than those prescribed for the College generally, and some schools have done so. ...

The Board also found that faculty effectively controlled faculty hiring, promotion and tenure. Furthermore, the recommendations of the faculty controlled College Tenure and Promotion Committee were followed in 119 out of 120 cases. Similar authority was found concerning financial and budgetary control. The Board concluded:

... We find that the faculty here possesses and exercises authority similar to that possessed and exercised by the faculty in *Yeshiva*. Thus, the record reveals that the faculties of each of the College's schools and the Division of Graduate Studies have extensive authority to formulate and effectuate policies for their respective schools, both through their individual school committees and through participation in the larger college scheme of governance involving the Academic Policies Committee and the College Faculty Council. The Employer has demonstrated that the faculty has absolute authority as to the College's curriculum, including course offerings, prerequisites, credit hours, class size, course schedules, and faculty teaching assignments. The faculty also determines the College's academic policies concerning, *inter alia*, admissions standards, academic standing, graduation requirements, grading, attendance, course distribution requirements, and examinations. In addition, the faculty possesses substantial authority in spheres beyond the strictly academic. Thus, the faculty controls the

hiring of faculty, as well as deans, the faculty tenure, and has an effective voice in budgetary matters and facilities planning. In view of all of the foregoing, and the record as a whole, we find that the unit sought by Petitioner is composed of managerial employees. ...

"Since we have concluded that the faculty members are managerial employees, we find it unnecessary to reach the issue of whether department chairpersons are supervisors within the meaning of Sec. 2(11) of the Act.

In *Ithaca*, the Board appears to have used the extensive authority test and rejected the "Ninety Percent rule." *Ithaca* is seen as damaging to union organizing efforts as no mitigating factors were present to account for the success of the managerial claim.

2. *Duquesne University of the Holy Ghost and Duquesne University Law School Faculty Association*, 261 NLRB No. 85, (1982).

In *Duquesne* and *Thiel*, the issue of catholicity was raised. Both institutions originally argued that the Board lacked jurisdiction in these matters basing their claim on *NLRB v. Catholic Bishop of Chicago et al*, 440 U.S. 490 (1979). However, in *Duquesne*, the university subsequently withdrew its challenge to Board jurisdiction. In *Thiel*, the Board first had to address itself to the jurisdictional issues before reaching a decision on the merits of the case. As in *Ithaca*, the Board held that the entire faculty at *Duquesne* were managerial and therefore, not entitled to the protection of the NLRA.

... As in *Yeshiva*, the law school faculty at *Duquesne* exercises significant authority over the law school's curriculum. It determines the requirements for each class, whether the classes are to be required or elective, and any changes in the curriculum of individual classes. The faculty also established the law school's current grading system. Although the dean can "pocket-veto" faculty recommendations, there is no evidence that he has done so. Furthermore, the school's bylaws require that the Dean "obtain the consensus of the faculty on academic matters." The bylaws further provide that faculty members shall enjoy full academic freedom in the classroom, and faculty members, in fact, have complete freedom with respect to classroom matters such as grading and course content. The faculty in *Yeshiva* exercised similar control.

The *Duquesne* law school faculty, like the faculty in *Yeshiva*, effectively controls admission and matriculation standards. It determines admission requirements, including grade point average and LSAT scores necessary for admission. The faculty also determines the levels of competence necessary for students to remain in school and, in accordance with necessary accreditation guidelines, the number of credits necessary for graduation. The faculty established a joint degree program and set the graduation requirements for that degree. The faculty has voted to reduce or increase class size and the administration has usually adhered to these recommendations. ...

The Board was also concerned with the extent of the authority that the faculty exercised in areas tangential to their academic role. The faculty had significant control over hiring, and the granting of tenure, however, their prerogatives were not as extensive as those recognized in *Yeshiva*.

The faculty in *Yeshiva* could make effective recommendations to the dean concerning terminations. Here, the faculty does not have this authority. Thus, despite faculty votes to the contrary, several faculty members have received notices of termination and the dean was reinstated for a second 5-year term despite a negative faculty vote. Moreover, if a faculty member is terminated and appeals, the faculty has no role in the appellate process. Although the authority of the *Duquesne Law School* faculty with respect to the termination of teachers is less than that exercised by the *Yeshiva* faculty, we do not find this determinative, given the similar authority exercised in other areas as outlined previously.

In sum, it is evident from the record that the managerial authority possessed by the *Duquesne* law school faculty is nearly

identical to that possessed by the faculty in *Yeshiva* in such critical academic matters as curriculum, grading systems, and admission and matriculation standards. Further, as in *Yeshiva*, the faculty here exercises its authority in nonacademic matters, including decisions concerning hiring and tenure. In view of all the foregoing, we find that the full-time faculty members sought by Petitioner are managerial employees. Accordingly, we shall dismiss the petition.

*Duquesne* marks a lessening of the *Yeshiva* standard inasmuch as the Board acknowledges that the faculty do not possess the degree of managerial authority found at *Yeshiva*; nevertheless the Board held that their degree of control is such as to warrant exclusion from collective bargaining under the Act.

3. *Thiel College and Thiel College Chapter American Association of University Professors*, 261 NLRB No. 84, (1982).

In *Thiel*, the Board has to reach the question of jurisdiction as the employer claimed immunity under *Catholic Bishop*. Citing *Barber-Scottia College, Inc.*, 245 NLRB 406 (1979), the Board found that since *Catholic Bishop* only applied to parochial, elementary and secondary schools jurisdiction was not a question.

As in *Duquesne* and *Ithaca*, the Board also held that the faculty at *Thiel* were managerial and through the Faculty Council and various committees made effective recommendations on hiring, tenure, sabbaticals, promotion and termination. The Board further found that the faculty as a whole do not have professional interests separate from that of the employer and even though there is a review mechanism of faculty decisions in place at the college, the faculty, in essence, are managerial.

In terms of quantifying the promotion process, the record showed that of the 20 promotions awarded in the last seven years, the President concurred with all but one of the faculty's recommendations. Concerning tenure, all of the recommendations were so followed. The Board concluded:

... that the Thiel College faculty makes decisions and effective recommendations in the overwhelming majority of critical areas relied upon by the Supreme Court in *Yeshiva University*.<sup>14</sup> The faculty constitution and the faculty bylaws authorize the professors to play this role, and the record establishes that, through the faculty council, the faculty executive committee, and other faculty committees, such power is actually exercised.

Like the teachers in *Yeshiva University*, the faculty herein controls the College's curriculum; each department makes recommendations regarding course offerings (and course content) which are reviewed by the faculty curriculum study committee, and which are ultimately approved or disapproved by the faculty through the faculty council. It also implements the curriculum in setting up course schedules and dividing the teaching load among the various departments' professors. Through the faculty council and its academic standing committee it supervises the overall academic performance of the College, including grade levels and academic standards. The faculty also determines who will be admitted and readmitted to the College; it establishes the academic requirements for obtaining degrees; and it certifies to the board of trustees, for its approval, those students eligible for graduation. In addition, each department prepares its own annual budget, which apparently is normally accepted by the College. The faculty is also involved in long-range financial and economic planning for the College. The faculty participates in setting its own salary and benefit levels, and adjusts faculty and student grievances. Finally, the Thiel College's faculty makes effective decisions on hiring, tenure, sabbaticals, terminations, and promotions.

Although, as in *Yeshiva*, ultimate authority is vested in the board of trustees, we conclude that the faculty of Thiel College, like that of *Yeshiva University*, does not have professional interests separate from those of its employer, and that it necessarily plays a large role in operating the College.

<sup>14</sup>There is no specific evidence concerning whether the Thiel College teachers are involved in decisions regarding academic calendars, student ab-

sence policies, enrollment levels, tuition, and the location of a school. However, art. II.B. of the faculty constitution, set forth in full *supra*, would appear to empower the faculty to make decisions in these areas. In addition, the Court clearly indicated that the faculties of only some of the 10 schools of *Yeshiva* covered by the petition effectively determined questions in these areas 444 U.S. at 677. Last, we do not regard faculty involvement or lack of involvement in these areas as vitally significant.

In *Thiel*, several illustrations were cited where the recommendations of the faculty were rejected, however, the Board did not consider these to be controlling when determining managerial status. Thus, it appears that even unilateral administration action is not sufficient enough to place faculty under the protection of the Act.

4. *Bradford College and Milk Wagon Drivers and Creamery Workers Union, Local 380, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 261 NLRB No. 81 (1982).

In *Bradford*, the Board held that the faculty were non-managerial and entitled to bargain under the protection of the NLRA. However, *Bradford* must be distinguished from the prior cases since it is a two-year institution and does not fall into the category of a mature university as delineated in *Yeshiva*. Additionally, the employer's claim of faculty managerial status was severely jeopardized by a 1981 Report of the New England Teachers Association, the regional accreditation agency. The report found that at *Bradford* there was a "... lack of [faculty] participation in academic decision making", a "disregard for stated operating procedures" and administrative decisions made "... in disregard of due faculty consideration." No effort at quantification was made in this instant case since many recommendations were often ignored by the administration. The Board held:

... In sum, while the faculty and division chairs have the written right to make recommendations, the record shows that such recommendations were often ignored or reversed by the president, by the academic dean, or by both with respect to curriculum, admission policies, graduation of students, course loads, course scheduling, grading of students, faculty hiring or retention, tuition, and faculty salaries. Applying the Supreme Court's criteria for managerial employees in institutions of higher learning, we conclude that the faculty in the instant case are not managerial employees. Accordingly, as the record evidence establishes, and the parties admit, that the employees involved here are professional employees within the meaning of the Act, we find that a unit of these professional employees is appropriate for the purposes of collective bargaining under the Act.

*Bradford* is considered by some observers to be a "union throw away" since the college's claim was so inconsistent with the standards delineated in *Yeshiva* that it seemed a foregone conclusion that its claim would be rejected. Subsequent to this order, a bargaining agent election was held with No-Agent defeating the IBT by a vote of 15-10.

5. *Montefiore Hospital and Medical Center and New York State Federation of Physicians and Dentists*, 261 NLRB No. 82 (1982).

In a case that transcends both academic collective bargaining and the organizational rights of medical doctors, the Board rejected a *Yeshiva* claim advanced by *Montefiore Hospital* and held that the doctors' positions, submitted in a unit petition, were protected under the Act. The employer claimed that staff physicians were managerial professional employees and thereby not entitled to bargain under the Act. However, the Board rejected that claim stating:

... As professional employees, the doctors may also be managerial, but their managerial status may not be based on decision-making which is part of the routine discharge of professional duties.

The administrative structure of the Medical Center was analyzed with analogies drawn to university governance. The functions of the Faculty Senate and department chairmen were described:

Department chairmen typically make the final selection of residents, although, in some departments, they "generally" follow the recommendations of a staff committee.

In short, the department chairman makes the managerial decisions, delegating some to subordinate supervisors. He does not rubber-stamp the staff's recommendations. Rather, as one departmental supervisor testified: "[The chairman's] decisions take into account the will of the staff."

The Board differentiated the staff physicians at *Montefiore* from the faculty at *Yeshiva University*.

An important factor distinguishing the position of the doctors as faculty members here from the faculty members in *Yeshiva* is that the *Yeshiva* faculty members were full-time teaching or otherwise educationally related personnel whose collegial authority with respect to academic matters was deemed to be so closely connected with the "business" of the university that their decisions constituted governance of the institution (444 U.S. at 688).

Routine exercise of authority does not automatically confer managerial status. Furthermore, the academic issues discussed by the faculty were mainly concerned with the delivery of health care and not that of traditional college governance. *Montefiore* is a teaching hospital and that is the primary foundation of the employment relationship. In sum the Board held:

... We cannot find, on the facts in this case, that the alleged managerial participation on which the Medical Center relies—if managerial and not professional—so aligns the staff doctors with management or places them sufficiently within the managerial structure as to warrant their exclusion.

Three other recent rulings by regional NLRB directors are also considered significant and are reported below.

6. *University of New Haven and University of New Haven Board of Faculty Welfare* Local No. 3956 C.S.F.T.-A.F.T., Case Nos. 39-CA-23, 39-CA-181, 39-CA-183 (1982).

In *New Haven*, the regional NLRB director dismissed three complaints filed by the faculty union alleging violations of the NLRA by the employer. Specifically, the union sought copies of individual faculty member contracts, reinstatement of recognition of the Board of Faculty Welfare as the bargaining agent and an end to the unilateral granting of wage increases by the university. The regional Board, after a series of hearings and rulings subsequent to the April 30th cases held as follows:

... From the extensive record there emerges three conclusions: the first, that the full time faculty is an important, integral and inseparable constituent of the shared governing authority at the University; the second, that each such faculty member is a managerial employee and, thus, possesses no organizational rights protected under the Act; and the third, that BFW, being composed exclusively of managerial employees and serving as representative of the University for the adjustment of grievances, is not a labor organization under the Act.

Accordingly, the consolidated complaints are dismissed.

It is interesting to note that the University of New Haven was the first institution to claim *Yeshiva* and was considered by many to be a significant case. *New Haven* is a further indication of the direction being taken by regional NLRB directors subsequent to *Ithaca et al*.

7. *Wordsworth Academy and American Federation of Teachers, AFL-CIO*, 262 NLRB No. 42 (1982).

Wordsworth Academy is a private school "engaged in providing special educational services" and was the subject of an organizing drive by the AFT. The Academy claimed that *Yeshiva* excludes its teachers, psy-

chologists and therapists from coverage under the Act since they are managerial employees. The Board analyzed the teachers' responsibilities and found that although they collectively and individually select and order teaching materials, monitor student's progress and decide on student promotion guidelines, they were not placed under the *Yeshiva* umbrella.

The Board found that the non-supervisory faculty have no part in hiring, firing and promotion and concluded that although the faculty "... exercise considerable discretion in some matters, this discretion does not extend beyond the routine performance of the tasks to which they have been assigned." The Board stated:

... Thus, unlike *Yeshiva*, the teachers at Wordsworth do not make recommendations to the administration in cases of faculty hiring, tenure, sabbaticals, termination, and promotion. Nor is it true that the teachers make final decisions regarding the admission and expulsion of individual students. The teachers offer their professional opinion as to whether the school can "help the child," but this is not in any way binding on the administration. They are clearly no more than professional employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned.

It is clear that *Yeshiva* is not applicable to teaching faculty at secondary schools since the level of authority possessed is insufficient to warrant their exclusion from protection under the Act.

8. *Wagner College and Wagner College Faculty Association, Local 4063, NYSUT, AFL-CIO*, 29-UC-147 (1982).

*Wagner* involved a finding by the regional NLRB director that the faculty at *Wagner*, a unionized college, were managerial. In granting the employer's petition for unit clarification, all full-time faculty members, including department chairmen, were excluded from the bargaining unit and the original certification issued to the AAUP was withdrawn. In reaching his decision, the regional director stated:

... Thus, while I am not satisfied here that the faculty completely determines at the College "the product to be produced, the terms upon which it will be offered, and the customers who will be served," the Board has not required such an absolute analysis in determining managerial status. Rather, the critical issue is whether the faculty exercises substantial authority in the majority of areas deemed to be "vital" by the Court and the Board. I conclude that the faculty does exercise such authority here, both in the area of academic concerns, and in areas beyond the strictly academic sphere. While the administration has taken significant unilateral action in many of these areas, to a greater degree than the administrations in *Yeshiva*, *Ithaca College*, *Thiel College*, and *Duquesne University*, I am, nevertheless, of the view that under the *Yeshiva* doctrine, as interpreted by the Board, the faculty here shares the real responsibility for governance of the institution. ...

*Wagner* must be distinguished from *Yeshiva* and *Ithaca et al* for it is the only case decided thus far where an already established collective bargaining relationship was declared invalid. The last collective agreement at *Wagner* was negotiated after a faculty strike in which *Yeshiva* was raised. As a part of a separate agreement reached ending the 1981 strike both sides agreed that the new collective bargaining agreement would not prejudice their claims with respect to pending proceedings before the Board and that only "... the record in Case No. 29-UC-147 shall form the basis of any appeal taken to the federal courts from a decision of the National Labor Relations Board ruling on the managerial status of the fulltime faculty members at Wagner College." (See separate Agreement dated April 20, 1981 and attached to Collective Bargaining Agreement.)

The problem of applying *Yeshiva* to an already unionized institution is addressed further in *Wagner*.

... However, the faculty setting involved in this case differs, in my view, from that involved in *Yeshiva*, and in the cases decided by the Board since *Yeshiva*. In *Yeshiva*, and in the recent Board cases,

the managerial status of faculty members was considered in the context of initial organizing situations. In the instant case, we are presented with the responsibility and authority of full-time faculty members after years of collective bargaining between the College and the faculty's duly recognized representative. This element, perhaps, is a factor which ought to be given some weight in assessing the managerial status of the full-time faculty members. It may very well be argued that some of the authority and responsibility exercised by the faculty in this case has been established as a result of the give-and-take of collective bargaining between the employer and the union," and that in such an arguably "adversarial" context, the faculty and management are not totally aligned and do not have virtually identical interests. However, neither the Court nor the Board has drawn any distinction between organized and unorganized faculty members in determining managerial status. I shall, therefore, apply the *Yeshiva* criteria, as interpreted by the Board, to the facts of this case.

"Thus, where there is a collective bargaining history, it might also come to pass that the faculty union, by virtue of its own "success," has gained such authority for its faculty through the bargaining process so as to have bargained itself out of "mandatory" bargaining, and, indeed, out of coverage under the Act.

What role *Wagner* will have in the forthcoming decisions at Polytechnic Institute of New York and Boston University, two unionized institutions with established collective bargaining relationships, remains to be seen but surely the issues raised in this instant case need further study.

#### SUMMARY AND CONCLUSIONS

*Yeshiva*-related issues still continue to be at the forefront of academic collective bargaining in the private sector. The number of institutions submitting either unit clarification petitions or refusing to bargain and unions filing refusal to bargain charges pursuant to the NLRA have risen during the past year from 37 to 49. Union organizing in the private sector remains at a standstill with several academic unionists privately admitting that the *Yeshiva* litigation battle, as it presently stands, has been lost. Neither the courts nor the NLRB have given any indication of a reversal in labor's favor and although the Memorandum of the NLRB General Counsel was initially viewed by the unions as encouraging, the recent decision in *Ohio Northern* have diminished that perception. In essence, unions are, of course, still free to organize and bargain collectively, however, they can no longer do so under the protection of the NLRA; nor can they use the Board as an organizing weapon.

*Boston University* and *Polytechnic Institute of New York* will be dispositive in terms of adjudicating future claims. If *Yeshiva* is extended to these two institutions, then for all practical purposes the legal battle has been lost and the unions will have no alternative except to shift to the legislative arena. Success in that forum is unlikely as no preemptive federal legisla-

tion is seen at this time. Likewise, the prospects for enacting new enabling legislation for public sector institutions appear dim.

The number of public sector institutions filing claims remains at two. No proliferation in claims is expected, however, most public sector statutes are modeled after the NLRA and changes can be expected to filter through to state PERBs albeit a significant time lag. Initially, public sector unions may be forced to give up department chairs in exchange for organizing rights for teaching faculty. The two public sector claims that were filed were not considered serious challenges to the existing legal framework. The Alaskan claim was directly linked to a pending union election, while the one at Kansas was designed to "test the waters."

A guide to future "*Yeshivas*," in the event that any should reach the USSC, may be found in the recent decision of the court in *NLRB v. Hendricks County Rural Electric Membership Corp.*, 70L. Ed. 2d 323 (1981). In *Hendricks*, the court unanimously refused to deny the protection of the Act to all confidential employees, limiting it only to those where the long established Board standard of the "labor nexus test" applied. Superimposed on faculty governance, *Hendricks* would seem to suggest that only certain faculty would be exempt from collective bargaining assuming *arguendo*, the applicability of the "labor nexus test."

*Yeshiva* reaffirms the implied exclusion from the Act for representatives of management. Perhaps a clearer definition of the distinctions between employer and employee will emerge as bargaining units will now consist solely of teaching faculty. Campus governance will need to be reassessed with perhaps more AAUP-type settlements being enacted. The collective bargaining rights of other professionals in the post-*Yeshiva* period will be carefully scrutinized and perhaps replicated.

*Yeshiva* has forced those engaged in academic collective bargaining to rethink and reshape shared governance and has brought campus labor relations closer to the industrial model.

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